Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

CAPT JACK B. SUMRALL, COLONEL JAMES R. LEE,
TSGT ALFRED D. BURROWS, PETITIONERS

v.

UNITED STATES OF AMERICA, RESPONDENT

Petition For a Writ of Certiorari to the United States Court of Appeals for the Armed Forces

PETITION FOR WRIT OF CERTIORARI

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48 pp

QUESTIONS PRESENTED

1. Whether a sentence to a punitive discharge violates the Eighth Amendment and is disproportionately severe in Petitioners' cases where, if executed, it will lead to loss of retirement benefits including potentially over half of a million dollars.

2. Whether a sentence to a punitive discharge that, if executed, terminates retirement benefits, violates the Fifth Amendment to the Constitution, where there was no meaningful opportunity to be heard.

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The Petitioners, Captain Jack B. Sumrall, Colonel James R. Lee, and TSgt Alfred D. Burrows, respectfully pray that a writ of certiorari issue to review the order and judgment of the United States Court of Appeals for the Armed Forces entered in their cases on 30 September 1996.

OPINIONS BELOW

The orders and judgment of the United States Court of Appeals for the Armed Forces, reported at *United States v. Sumrall* __ M.J. __ (1996), *United States v. Lee* __ M.J. __ (1996), *United States v. Burrows* __ M.J. __ (1996) are located at Appendix A. The respective opinions of the United States Air Force Court of Criminal Appeals are located at Appendix B.

JURISDICTION

The final orders of the United States Court of Appeals for the Armed Forces were entered on 30 September 1996. The jurisdiction of this Court is invoked under 28 U.S.C. Sec 1259 (3) (West Supp. 1995) and 10 U.S.C. Sec 867(a) (West Supp. 1994).

CONSTITUTIONAL PROVISIONS INVOLVED

The Eight Amendment provides that . . .

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The Fifth Amendment provides that . . .

> No person shall . . . be deprived of life, liberty, or property, without due process of law.

STATEMENT OF THE CASE

Captain Sumrall confessed to Office of Special Investigation agents when questioned (Pros Exh 1) and pleaded guilty to touching his fourteen year old step–daughter's breasts and vagina and having her touch his penis on multiple occasions. He has recognized the seriousness of his offenses and acknowledged his guilt. R 88.

Prior to the offenses to which he pleaded guilty, Captain Sumrall had no disciplinary history and an outstanding record during 21 years of enlisted and commissioned service. He has received 30 medals and ribbons. Pros Exh 5. He has demonstrated uniformly outstanding performance during 21 years of world–wide service, completing superbly whatever was asked of him and accomplishing much more. Pros Exh 6, Def Exh A9, C1–6, D1–5, E1–9, F1–7, G1–20, H1–10, I1–11, J1–14.

Captain Sumrall's basic pay was $3427.10 per month. Pros Exh 5. If Captain Sumrall were allowed to retire at twenty years, he would receive the resultant 50% of base pay per month, i.e. $1713.55, or $20,562.60 per year. *See* 10 U.S.C. section 8991. Assuming the Petitioner would live until the age of seventy-one (he is now 41), the uncompounded and non–inflation adjusted total he would receive would be $616,878.00.

After 26 years of outstanding service in the United States Air Force, Petitioner Lee was charged with offenses related to his sexual relationships with three young men. His service record was impressive, including receiving two Air Medals (1970, 1972) and two Distinguished Flying Cross awards.

By the time of trial Colonel Lee had, on his own initiative, undergone therapy from six psychiatrists, two psychologists, and two pastors (R. 93). Petitioner Lee pled guilty to the charged offenses and was sentenced to a

dismissal and 7 years confinement. Based on his 26 years of service the effect of an executed dismissal would be the loss of $750,000 in present day terms. Def. Ex. I.

Petitioner Burrows had served 20 years in the United States Air Force at the time of trial. Pros. Ex. 1. The character of that service was excellent. Post Trial Matters, SJA recommendation. His base pay per month was $1885.20. Pros. Ex. 1. He was convicted, pursuant to his pleas of two counts of indecent acts. Based upon a life expectancy of 74 years, the amount of retirement pay forfeited by execution of the discharge is about $407,196.00.

REASONS FOR GRANTING THE WRIT

I. A SENTENCE TO A PUNITIVE DISCHARGE CONSTITUTES A VIOLATION OF THE EIGHTH AMENDMENT AND IS DISPROPORTIONATELY SEVERE IN PETITIONERS' CASES WHERE IT RESULTS IN A LOSS OF RETIREMENT BENEFITS INCLUDING POTENTIALLY OVER HALF OF A MILLION DOLLARS

The Petitioners recognize that the Uniform Code of Military Justice and military case law allows for punitive discharge of military members, including retirement eligible personnel. However, military law has been overtaken in recent years by Constitutional law in this area[1] and the Petitioners' raise their claims under the Eighth Amendment to the United States Constitution.

The Eighth Amendment provides that "Excessive bail

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[1] For example, two of the three cases cited by the Air Force Court of Criminal Appeals on this point in *United States v. Sumrall* (AF Ct. Crim App. 1996) are from the 1950s.

shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[2] This Honorable Court in *Harmelin v. Michigan,* 501 U.S. 957, 111 S.Ct. 2680 (1991) (Justice Kennedy joined by Justices O'Connor and Souter in a opinion concurring in result) recognized that there is a principle of proportionality encompassed in the Eighth Amendment that applies to noncapital cases. *Id* at 2703. This principle holds that an otherwise lawful sentence may violate the Eighth Amendment if it is sufficiently disproportionate given the facts of the case. *Id* at 2703–2704. These Eighth Amendment protections extend to all criminal punishments including civil forfeiture proceedings, *Austin v. United States,* 509 U.S. 602, 113 S.Ct. 2801 (1993), and all other forms of monetary criminal punishment, *Browning–Ferris Industries v. Kelco Disposal, Inc.,* 492 U.S. 257, 109 S.Ct. 2909 (1989) (punitive damages in civil case not covered). Forfeiture of personal property interests as part of a criminal proceeding imposed on top of a sentence to confinement and a conventional fine is "clearly a form of monetary punishment no different, for Eighth Amendment purposes, from a traditional 'fine.' Accordingly, the forfeiture . . . should be analyzed under the Excessive Fines Clause." *Alexander v. United States,* 509 U.S. 544, 113 S.Ct. 2766, 2775 (1993) (where the accused's interests in certain businesses were adjudged forfeited to the United States in addition to the imposition of a sentence of six years confinement and a $100,000 fine for various pornography and RICO offenses).

Military members who have served twenty years or more gain statutory entitlement to retirement pay. 10 U.S.C. sections 1401, 8911. Such Congressionally created entitlement creates a property right in the benefits afforded by the statute. *See, e.g., Goldberg v. Kelly,* 397 U.S. 254, 262, 90 S.Ct. 1011, 1017

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[2] Article 55, U.C.M.J., echoes this prohibition against cruel and unusual punishment but does not specifically mention fines.

(1970). A deprivation of these property interests as part of a criminal proceeding thus becomes a form of "monetary punishment no different, for Eighth Amendment purposes, from a traditional 'fine.'" *Alexander,* 113 S.Ct. at 2775.[3]

II. THE EFFECT OF THE SENTENCE (PUNITIVE DISCHARGE) VIOLATES THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT TO THE CONSTITUTION

The Fifth Amendment guarantees that "no person shall . . . be deprived of life, liberty, or property, without due process of law." At the time of trial Petitioners all had served at least twenty years in the military, making them retirement eligible. The Court of Appeals for the Armed Forces assumed, when deciding, that Petitioners had a Constitutionally protected interest. This Court has defined a Constitutionally protected property interest, or "entitlement," as:

> . . . more than an abstract need or desire for [the property] it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. . . Property interests, of course, are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law––rules or understandings that secure certain benefits and that support claims of entitlement to those benefits. Thus, the welfare recipients in *Goldberg v. Kelly* [397 U.S. 254, 90

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[3] The solution to this problem is the creation of a new option to the list of possible punishments that a court–martial may consider––a discharge with no loss of retirement benefits. *See, United States v. Ives,* __MJ__ (USCA Dkt No. 96–0619, Order Denying Petition) (J. Sullivan, dissenting).

> S.Ct. 1011, — L.Ed.2d. — (1970)] had a claim of entitlement to welfare payments that was grounded in the statute defining eligibility for them.

Board of Regents v. Roth, 408 U.S. 564, 577, 92 S.Ct. 2701, 2709 (1972)

> The hallmark of [a property interest], the court has emphasized, is an individual entitlement grounded in state law, which cannot be removed except "for cause." . . . Once that characteristic is found, the types of interests protected as "property" are varied and, as often as not, intangible, relating "to the whole domain of social and economic fact." (citations omitted).

Logan v. Zimmerman, 455 U.S. 422, 431, 102 S.Ct. 1148, 1155 (1982). Where there is no independent basis in State or other underlying law, there is no Constitutionally protected interest. *Leis v. Flynt,* 441 U.S. 956, 99 S.Ct. 698 (1979). In addition, "[t]he 5th Amendment does not apply to the indirect adverse effects of governmental action." *O'Bannon v. Town Court Nursing Center,* 447 U.S. 773, 790, 100 S.Ct. 2467, 2477 (1980). In spite of these limitations, statutorily created entitlements have been found in many benefit or other programs established by state and federal statute and/or regulation. *Mathews v. Eldridge,* 424 U.S. 319, 96 S.Ct. 893, (1976); *Goss v. Lopez,* 419 U.S. 565, 95 S.Ct. 729 (1975); *Board of Curators of University of Missouri v. Horowitz,* 435 U.S. 78, 98 S.Ct. 948 (1978); *Memphis Light, Gas & Water Division v. Craft,* 436 U.S. 1, 98 S.Ct. 1555 (1978); *Barry v. Barchi,* 443 U.S. 55, 99 S.Ct. 2642 (1979); *Hewitt v. Helms,* 459 U.S. 460, 103 S.Ct. 864 (1983); *Cleveland Board of Education v. Loudermill,* 470 U.S. 532, 105 S.Ct. 1487 (1985); *Ponte v. Real,* 471 U.S. 491, 85 S.Ct. 2192 (1985); *Atkins v. Parker,* 472 U.S. 115, 105 S.Ct. 2520, 2529 (1985).

Where a statute utilizes "mandatory language and . . . structure" in creating an interest, that interest is protected under the Due Process Clause of the 5th Amendment even if the decision to grant the benefit sought is "necessarily subjective and predictive [in] nature." *Board of Pardons v. Allen,* 482 U.S. 369, 372, 107 S.Ct. 2415, 2417 (1987) *citing Greenholtz v. Nebraska Penal Inmates,* 442 U.S. 1, 99 S.Ct. 2100 (1979). In *Greenholtz* the interest in question was that of the applicant in the granting of parole. "In deciding that this statute created a constitutionally protected liberty interest, the Court found significant its mandatory language––the use of the word 'shall'––and the presumption created––that parole release must be granted unless one of four designated justifications for deferral is found." *Allen,* 107 S.Ct. at 2419. This Honorable Court came to the same conclusion in *Allen,* i.e. that inmate parole applicants had a protectable entitlement. Welfare applicants also have a protected interest in general relief payments where statutory criteria are plain and language mandatory. *Griffith v. Detrich,* 603 F.2d 118 (9th Cir. 1979), *cert. den.* 445 U.S. 970, 100 S.Ct. 1349 (1980). By contrast, a Connecticut commutation statute that imposed no criteria or even definitions but rather "unfettered discretion" on its Board of Pardons, created no entitlement. *Connecticut Board of Pardons v. Dumschat,* 452 U.S. 458, 467, 101 S.Ct. 2460, 2465 (1981).

Air Force members, such as the Petitioners, who have served twenty years or more may, upon the member's request, be retired by the Secretary of the Air Force. 10 U.S.C. sections 8911, 8914. "A member of the Air Force retired under this chapter is entitled to retired pay computed under chapter 871 of this title." 10 U.S.C. 8929. The computation table for calculating the exact monthly entitlement is at 10 U.S.C. 8991. For a member who had twenty years active duty, this would work out to be 50% of base pay per month for life.

Retirement pay is in addition to other benefits such as life long medical care.

Although the statute uses the word "may" when referring to whether the Secretary of the Air Force will retire the member at the time of his or her request, it is clear that this only allows the Secretary discretion as to exactly when the member is retired, i.e. at the time of the request, at some later point, or when finally mandated by law. In any case, even this Secretarial discretion is further limited. A retirement eligible Air Force member can only be separated other than by retirement under very specific conditions--all limited by statute or regulation. *See, e.g.,* 10 U.S.C. 1401 *et. sec.* (for medical disability retirement); AFI 36-3206 (for officer administrative separations); AFI 36-3208 (for enlisted administrative separations). Any discretion left to the Secretary certainly does not exceed that discretion residing with a parole board as described in *Greenholtz* and *Allen* and the Supreme Court has ruled that discretion did not destroy the entitlement.

In short, this "may" does not mean that the member is not entitled to retirement and retirement pay. The Congressional mandate is clear--"[a] member of the Air Force retired under this chapter is entitled to retirement pay." 10 U.S.C. 8929. This is clearly an entitlement protected by the Due Process Clause of the 5th Amendment of the United States Constitution.

"The essential requirements of due process . . . are notice and an opportunity to respond." *Loudermill,* 105 S.Ct. at 1495. The Court of Appeals For the Armed Forces stated that a retirement eligible service member is entitled to put into evidence that a punitive discharge would deny them retirement benefits. *Sumrall,* slip. op. 8. The Court further found that allowing a retirement eligible member to present this evidence during the sentencing proceeding of a

court–martial satisfied the due process clause requirements. *Id.* However, the Court failed to resolve the question of how Petitioners Sumrall and Burrows Fifth Amendment rights were met, where they did not, in fact, get such a hearing.

Petitioners Burrows and Sumrall admit that they did not attempt to convince the trial judge to disregard precedent and consider the consequences of a punitive discharge on them as retirement eligible members. The established rule, prior to the Court of Appeals ruling in the Petitioner's case, as recognized by the Air Force Court of Criminal Appeals in *Lee,* has been clear: such evidence is not admissible––and military trial judges are presumed to know and apply the law. *See, e.g., United States v. Vangelisti,* 30 M.J. 234 (C.M.A. 1990). However, where existing military case law has prevented a military member from exercising a Constitutional right––the issue should not be treated as waived but rather should be treated as plain error. Thus, the Court of Appeals has erred if the basis for their decision in this respect was waiver.

The Petitioner recognizes that for an error, not challenged at trial, to reach the level of "plain error," it must be "obvious." *United States v. Fisher,* 21 M.J. 327, 328 (C.M.A. 1986). As the Supreme Court has explained, "'plain' is synonymous with 'clear' or, equivalently, 'obvious.'" *United States v. Olano,* 507 U.S. 725, 113 S.Ct. 1770, 1777, (1993). In other words, the error must be in direct conflict with existing law.

In the Petitioner's case, when making the decision as to whether a trial judge's decision was in conflict with existing law, the determining law is not military case law dealing with the exclusion of collateral consequences but rather the Supreme Court case law recognizing 5th Amendment Due Process rights. Thus where a trial judge's ruling, even if in accord with some military precedent, conflicts with a

Constitutional Due Process right, it should rise to the level of plain error.

As the Supreme Court has explained and the Court of Appeals for the Armed Forces recognized in *Fisher,*

> The plain error doctrine is invoked to rectify those errors that "seriously affect the fairness, integrity or public reputation of judicial proceedings," *United States v. Atkinson,* 297 U.S. 157, 160, 56 S.Ct. 391, 392, 80 L.Ed. 555 (1936). As a consequence, it "is to used sparingly, solely in those circumstances in which a miscarriage of justice would otherwise result." *United States v. Frady,* [456 U.S. 152, 163 n.14, 102 S.Ct. 1584, 1592 n.14, 71 L.Ed.2d 816 (1982)]

Fisher, 21 M.J. at 329. Surely, where military case law prevents a military member from exercising a fundamental Constitutional due process right and thus prevents a military judge from considering the impact of the loss of a sum of money potentially in excess of over half a million dollars, that should be treated by this Honorable Court as plain error and thus not waived.

CONCLUSION

The punishment of punitive discharge in each of the Petitioners' cases means depriving that Petitioner and his family of something in the order of over half a million dollars earned during over two decades of dedicated service. Without an opportunity to present the impact of this loss, Petitioner's Sumrall and Burrows due process rights were violated. In addition, surely any fine assessed in such an amount, imposed on top of lengthy terms of confinement and additional forfeitures, constitutes a violation of the Eighth Amendment's prohibitions against cruel and unusual punishment and

excessive fines. Such punishment is disproportionate and excessive given the facts in the Petitioners' cases.

Respectfully submitted,

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December 1996

APPENDIX A

UNITED STATES, Appellee

v.

Jack B. SUMRALL, Captain
U.S. Air Force, Appellant

No. 95–0720
Crim. App. No. 31151

United States Court of Appeals for
the Armed Forces

Argued February 1, 1996

Decided Sep. 30, 1996

Counsel

For Appellant: *Major Ormond R. Fodrea* (argued); *Colonel Jay L. Cohen* (on brief).

For Appellee: *Captain R. Scott Howard* (argued); *Lieutenant Colonel Michael J. Breslin* (on brief).

Military Judge: J.C. Suhar

Opinion of the Court

SULLIVAN, Judge:

> My object all sublime I shall achieve in time to let the punishment fit the crime––the punishment fit the crime.[1]

This is a case where we must measure the sentence of a court–martial against the yardstick of the Due Process Clause of the Fifth Amendment of the Constitution.

Appellant was tried by a general court martial composed of a military judge sitting alone at Ramstein Air Base, Germany, on February 24, 1994. In accordance with his pleas, he was found guilty of committing indecent acts with a female under the age of 16 years (2 specifications), in violation of Article 134. Uniform Code of Military Justice, 10 USC § 934. He was sentenced to dismissal and confinement for 4 years. The convening authority approved the sentence as adjudged on May 2, 1994. The Court of Criminal Appeals in an unpublished opinion affirmed on March 8, 1995.

On September 5, 1995, this Court specified the following issue for review:

> WHETHER THE EFFECT OF THE SENTENCE (DISMISSAL) VIOLATES THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT TO THE CONSTITUTION.

We hold that appellants court–martial sentence did not deprive him of his retirement pay and other retirement benefits without due process of law. *See generally Weiss v. United States*,—U.S. —, 114 S.Ct. 752, 127 L.Ed.2d 1 (1994), and *United States v. Griffin*, 25 MJ 423 (CMA 1988); *see also* 10 USC § 8911.

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[1] W.S. Gilbert, *The Mikado*, Act II, lines 337–40 (1884).

The record of trial in this case shows that appellant had completed 21 years of enlisted and commissioned officer service. It also shows that at the time of trial appellant's base pay was $3427.10 per month. His wife testified that it was her understanding that she would receive no military benefits if her husband was dismissed from the service. Finally, defense counsel at least implicitly argued that appellant's dismissal would leave him and his family with nothing.

Before this Court, appellant asserts that if he were allowed to retire he would receive approximately $20,562.60 per year for the rest of his life. He further asserts that, "assuming the appellant would live until the age of seventy (he is now 40), the uncompounded and non–inflation adjusted total he would receive would be $616,878 00." Final Brief at 2. No legal objection to appellant's sentence was made at trial.

The broad question presented in this case is whether a court–martial sentence to a dismissal unlawfully denied retirement benefits to appellant, a retirement eligible military officer. At the outset, we recognize that appellant was not sentenced to a forfeiture of his retirement pay or other retirement benefits. For that matter there is no express authorization in the Uniform Code of Military Justice or the Manual for Courts–Martial for the denial of retirement benefits. However, the Uniform Code of Military Justice does authorize punitive discharges (dismissal for officers––*see* Arts. 66(b)(1) and 71(b)&(c)(1), UCMJ, 10 USC § 866(b)(1) and 871(b) & (c)(1), respectively) and appellant received that punishment. Moreover, in certain cases, a punitive discharge such as a dismissal might automatically trigger a loss of retirement benefits as a matter of statutory law not found in the Uniform Code of Military Justice. *See McCarty v. McCarty,* 453 U.S. 210, 222 n.14, 101 S.Ct 2728, 2736 n.14 (1981); 5 USC § 8312 (loss of retired pay due to court–martial conviction for certain national security

offenses); 38 USC § 5303(a) (loss of veterans benefits when dismissed from service by general court–martial). Finally, it has also been held that a dismissal effectively terminates a retired servicemember's entitlement to retirement pay. *See Hooper v. United States*, 326 F.2d 982, 988 (Ct. Cl. 1964) (Admiral Hooper was tried in his retired status and was receiving retired pay––*see generally United States v. Hooper*, 9 USCMA 637, 26 CMR 417 (1958)).

In this context we are not inclined to overlook this issue simply because appellants court–martial sentence did not expressly deny him retired pay. We recognize that the decision to retire an Air Force officer in appellant's grade and time in service rests by statute with his service secretary. Title 10 USC § 8911 states:

> (a) The Secretary of the Air Force *may*, upon the officer's request, retire a regular or reserve commissioned officer of the Air Force who has at least 20 years of service computed under section 8926 of this title, at least 10 years of which have been active service as a commissioned officer.

See also 10 USC § 638 (selective early retirement without request).

In light of the above, the specified issue before us is whether appellants court–martial denied him his retirement pay and other retirement benefits without due process of law. *See Board of Regents v. Roth*, 408 U.S. 564, 577, 92 S.Ct. 2701, 2709 (1972). Appellant did not make this legal claim at his court–martial or before the Court of Criminal Appeals. Moreover, to our knowledge, he has not even requested retirement, and the Secretary of the Air Force has not otherwise retired him. *See* 10 USC §§ 8911 and 639 (service secretary may postpone retirement decision pending court–martial proceedings). Accordingly, a substantial question exists whether he has a legally sufficient property

interest at the present time for purposes of a Due Process Clause claim. *See United States v. Larionoff*, 431 U.S 864 (1977); *Zucker v. United States*, 758 F.2d 637 (Fed. Cir. 1985); see *also Norman v. United States*, 392 F.2d 255, 265 (Ct. Cl. 1968), citing *Bell v. United States*, 366 U.S. 393 (1961). *But see Barker v. Kansas*, 503 U.S. 594, 605, 112 S.Ct. 1619, 1626 (1992) (military retirement benefits are to be considered deferred pay for past services for purposes of 4 USC § 111).

Assuming he does have such an interest, the next question in this case is whether he was afforded due process at his court–martial with regard to their taking or denial. *See Brock v Roadway Exp., Inc.*, 481 U.S. 252, 262, 107 S.Ct. 1740, 1747, 95 L.Ed.2d 239 (1987). The potential loss of retirement benefits was a proper matter for consideration by factfinders at appellant's courts–martial. *See generally* RCM 1001(c)(l)(B), Manual for Courts–Martial, United States, 1984 (defense may present matters in mitigation "to lessen the punishment to be adjudged by the court–martial"). This Court has particularly held that retirement–eligible servicemembers are entitled to put into evidence that a punitive discharge would deny them retirement benefits. *United States v. Griffin*, 25 MJ 423 (1988). Furthermore, servicemembers associated with loss of retirement pay, subject to foundational requirements related to the reliability of their projections, may present evidence of the potential dollar amount subject to loss. *Id.; cf. United States v. Henderson*, 29 MJ 221 (CMA 1989). Accordingly, to the extent that a dismissal affects retirement benefits including pay, we conclude these procedures satisfy the meaningful opportunity to be heard concerns of the Due Process Clause. *See generally Weiss v. United States*, —U.S.—, 114 S.Ct. 752, 127 L.Ed. 1 (1994); *Brock v. Roadway Exp., Inc., supra.*

A second constitutional issue arising in this context is whether an expected forfeiture of some $600,000 is "cruel and

unusual" punishment within the meaning of the Eight Amendment. *See Harmelin v. Michigan*, 501 U.S. 957, 111 S.Ct. 2680 (1991). Here, appellant argues that "[s]urely any fine assessed in such amount [over half a million dollars] constitutes cruel and unusual punishment under the Eighth Amendment." Final Brief at 4. We disagree.

Dismissal (a punitive discharge for officers) is a punishment long known to our military and the armies of other civilized countries. *See United States v. Ohrt*, 28 MJ 301, 306 (CMA 1989); *see also* W. Winthrop, *Military Law and Precedents* 405–06 (2d ed. 1920 Reprint). Moreover, forfeiture of pay and retired pay are punishments that are well recognized punishments at American courts–martial. *Id.* at 427–31. *See McCarty v. McCarty*, 453 U.S. at 222 n.14. Finally, the effect of dismissal on retirement pay has long been recognized. *See Hooper v. United States*, *supra* (since plaintiff was validly dismissed from the Navy, his entitlement to retired pay no longer existed). Accordingly, dismissal with its effect of denying future retirement pay is not cruel and unusual[2] in the sense intended by the Eighth Amendment. *Harmelin v. Michigan*, *supra* at 976, 111 S.Ct. at 2691.

A related constitutional issue also arising in this case is whether the expected forfeiture of some $600,000 in retirement pay is "an excessive fine" within the meaning of the Eighth Amendment. *See Austin v. United States*, 509 U.S. 602, 113 S.Ct. 2801 (1993). Appellant argued before the Court of Criminal Appeals that a huge forfeiture of money for only 2 specifications of indecent acts with one girl was clearly "disproportionate." We note that the amount of retirement pay

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[2] Article 53, Uniform Code of Military Justice prohibits "any other cruel or unusual punishments." Assuming that standard is more favorable to a military accused than the Eighth Amendment we find no violation of that standard in this case.

purportedly forfeited in this case is clearly speculative to the extent that it depends on a prediction of appellant's life expectancy. In any event, the 2 specifications of which appellant was convicted involved numerous diverse sexual acts committed with a minor by a military officer over a lengthy period of time. *See Alexander v. United States,* 509 U.S. 544, 113 S.Ct. 2766, 2776 (1993). We find no excessive or disproportionate forfeiture as prohibited by the Eighth Amendment in these circumstances.

A final constitutional issue arising in this case is whether the future denial of retirement pay and other retirement benefits in addition to his court–martial sentence violates the Double Jeopardy Clause of the Fifth Amendment. *See United States v. Halper,* 490 U.S. 435, 448–49, 109 S.Ct. 1892, 1902 (1989). More importantly, it is the Secretary of the Air Force who denies retired status to a servicemember, 10 USC § 8911, not this court–martial. This Court has no jurisdiction to review a service secretary's decision under 10 USC § 8911, when and if such action is taken. *See* Art. 67, UCMJ, 10 USC § 867 (1989). Finally, military retirement pay at least in part is intended as reduced compensation for future services that appellant by reason of his dismissal cannot perform. *See* 10 USC § 688; *McCarty v. McCarty,* 453 U S. at 221–22. In this sense, denial of his retirement pay is remedial and might not be considered a plain–error violation of the Double Jeopardy Clause. *See Austin v. United States,* 509 U.S. at 619–23, *supra* at 2811–12.

Moreover, the consequences that appellant suffers after execution of a proper sentence under the law of the Uniform Code of Military Justice is a matter outside our jurisdiction as a court under Article 67. Even though a court–martial sentence may result in a huge loss of retirement pay, loss of veteran benefits, loss of the right to vote, or possess firearms, etc., these consequences all are beyond our jurisdiction.

Jurisdiction or judicial power is a matter of time and place. The time when a court or an authority has jurisdiction is determined by the law which invests that court or authority with the power to act on a case. *See United States v. Boudreaux*, 35 MJ 291, 296 (CMA 1992) (Sullivan, C.J., concurring in the result) (the "tunnel of power" case). The area or scope of a court's jurisdiction also is set by the law that both defines and limits the power of the court to act.

Our Court has judicial power over a special field of law, that field is defined in the Federal law of the Uniform Code of Military Justice. We as a court tend and cultivate this special field of justice in the military. We can use the Constitution as a measure of fairness and a tool of redress in that field. The criminal trial and the criminal sentence of appellant are within that field. However, in this case, we can give no relief because the consequences appellant complains of (the loss of retirement pay) are outside the boundaries of our field of law. *See generally United States v. Blocker*, 33 MJ 349 (CMA 1991). *cf. United States v. Navy–Marine Corps Court of Military Review v. Cheney*, 29 MJ 98 (CMA 1989). Title 10 USC §§ 8911 and 639 are the laws that take away the projected $600,000 pension. This is a civil, not a criminal law. As much as we may like to measure that law, it is beyond our power and reach. Perhaps another court can help appellant. We cannot and will not.

The decision of the United States Air Force Court of Criminal Appeals is affirmed.[3]

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[3] It is my personal belief that something should be done about the problem in the military justice system where the effect of the court–martial sentence for a crime inevitably triggers a huge loss in retirement pay. There is a solution to this problem. I have written about it but can do no more. (*See* the order in *United States v. Ives*, attached as an Appendix.) Of course I will continue to apply the law

Chief Judge COX, Judges CRAWFORD and GIERKE, and Senior Judge EVERETT concur.

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[3] Cont. as it presently is. As Justice Oliver Wendell Holmes, Jr., once remarked in a discussion with the Solicitor General, John W. Davis, when told many more Sherman Anti–Trust Laws were headed to the Supreme Court:

> "Well, bring em on and we'll decide them. Of course I know, and every sensible man knows, that the Sherman [Anti–Trust] Law is damned nonsense, but if my country wants to go to hell, I am here to help it."

W. Harbaugh, *A Lawyer's Lawyer: The Life of John W. Davis* (Oxford University Press).

UNITED STATES, Appellee

v.

Kenneth L. IVES, Jr. (365–74–9640), Appellant)

USCA Dkt. No. 96–0619/AF

Crim. App. No. S29118

ORDER DENYING PETITION

On consideration of the petition for grant of review of the decision of the United States Air Force Court of Criminal Appeals, it is by the Court this 2nd day of July, 1996,

ORDERED:

That said petition be, and the same is hereby denied.

SULLIVAN, Judge (dissenting):

Under the existing law, I would grant and affirm this case. However, I respectfully dissent from the law I must apply in this case, and I hope my dissent will call attention to what I perceive as a flaw in our system of justice and suggest a remedy to this flaw.

It's important to see the facts in this case in order to outline the flaw in the system. Appellant was a Desert Storm veteran and staff sergeant with 15 years of superior service. At the time of his crime, he was within weeks of getting out of the Air Force with early separation pay of over $200,000. He is the sole supporter of his wife, his daughter, and his mother who lives with him. This was his crime––at a party, two women encouraged him to share one of their marijuana cigarettes. A subsequent random drug test showed him

positive for marijuana. He admitted to the offense and for punishment was given confinement of 2 months, forfeiture of $700.00 pay, reduction to E–3, and a bad–conduct discharge.

This is a typical result in a court–martial in the United States military today. The punishment here was not unexpected because the modern military is an all–volunteer force with high standards. A conviction by a court–martial even for a minor crime (by civilian standards) usually carries with it a discharge from the service. Even a one–time first offender usually gets a punitive discharge. The bad–conduct discharge here carried with it an automatic loss of the $200,000 early separation pay. In many cases where the servicemember has served over 20 years and thus is entitled to annual retirement pay and medical benefits for life, the loss of these benefits is likewise automatic with a punitive discharge. This additional loss of benefits can well result in a loss of over a million dollars, depending on one's rank and length of service.

Presently, there are only five general punishments available in a military trial: death, in rare cases; confinement; loss of rank; monetary loss (forfeiture of pay and allowances or fine), and a punitive discharge (or dismissal) from the service. In the modern military, high standards are set and a conviction of a crime in a court–martial usually brings on discharge and the automatic loss of a pension and medical benefits if a person has served over 20 years.

Time Magazine recently related a story of a Coast Guard officer with 30 years of service who committed suicide during a criminal investigation following the officer's telling three "sexist jokes" to 118 cadets in a dinner speech at the Coast Guard Academy, *Time* Magazine related that the officer, with a wife and two children, "feared the loss of a pension that a court–martial might mean." ("A Political Suicide," *Time Magazine* at 44 (May 13, 1993)). With regard to the case at

bar, I doubt that there is any jurisdiction in America outside of the military where a first–time offender, who takes several puffs of a marijuana cigarette, is punished by 60 days in jail and a fine of over $200,000.

My suggestion is that a new option be added to the list of possible punishments that a court–martial may consider––a discharge with no loss of retirement benefits.

This new punishment will allow better and more flexible justice in the present system. Our Court must do justice within the existing system. We cannot by judicial rulemaking or legislation create a new type of punishment. However, the President by exercising his power under Article 56, Uniform Code of Military Justice, 10 USC § 856, or Congress by legislation, can give the court–martial this new type of punishment. The new punishment option for a court–martial may not be able to help the instant appellant but future minor criminal offenders may benefit from a punishment that better fits the crime.

For the Court,

/s/ John A. Cutts, III
Deputy Clerk of the Court

cc: The Judge Advocate General of the Air Force
Appellate Defense Counsel (McINTYRE)
Appellate Government Counsel

UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee

v.

James R. LEE (430–84–3012), Appellant

USCA Dkt. No. 95–1160/AF

Crim. App. No. 30984

ORDER

On further consideration of the granted issues (43 MJ 432) in light of *United States v. Sumrall*, No. 95–0720, __MJ__ (Sept. 30, 1996), it is, by the Court, this 30th day of September, 1996

ORDERED:

That the decision of the United States Air Force Court of Criminal Appeals is affirmed.

For the Court,

/s/ John A. Cutts, III
Deputy Clerk of the Court

Judge EFFRON concurs in the result.

cc: The Judge Advocate General of the Air Force
Appellate Defense Counsel (OVERLY)
Appellate Government Counsel (INFELISE)

UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee

v.

Alfred D. BURROWS (548–06–7992),

Appellant

USCA Dkt. No. 96–0118/AF

Crim. App. No. 31112

ORDER

On further consideration of the granted issue (43 MJ 474) in light of *United States v. Sumrall,* No. 95–0720, __MJ__ (Sept. 30, 1996), it is, by the Court, this 30th day of September, 1996

ORDERED:

That the decision of the United States Air Force Court of Criminal Appeals is affirmed.

For the Court,

/s/ John A. Cutts, III
Deputy Clerk of the Court

Judge EFFRON concurs in the result.

cc: The Judge Advocate General of the Air Force
Appellate Defense Counsel (OVERLY)
Appellate Government Counsel (BRESLIN)

APPENDIX B

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Captain JACK B. SUMRALL, 434–90–6135

United States Air Force

ACM 31151

8 March 1995

Sentence adjudged 24 February 1994 by GCM convened at Ramstein Air Base, Germany. Military Judge: John C. Suhar (sitting alone).

Approved sentence: Dismissal and confinement for 4 years.

Appellate Counsel for Appellant: Colonel Jay L. Cohen, Lieutenant Colonel Frank J. Spinner, and Major Ormond R. Fodrea.

Appellate Counsel for the United States: Colonel Jeffrey T. Infelise, Colonel Thomas E. Schlegel, and Captain R. Scott Howard.

Before

SNYDER, PEARSON, and SCHREIER
Appellate Military Judges

OPINION OF THE COURT

PEARSON, Judge:

With the benefit of a pretrial agreement, appellant pled guilty in a bench trial general court–martial to sexually abusing his minor stepdaughter over a three year period. The court sentenced him to a dismissal and 4 years confinement which the convening authority approved. In a single assignment of error, appellant contends his sentence to a dismissal constitutes "excessive, cruel, and unusual punishment" and is inappropriately severe. We affirm the approved sentence.

FACTS

Appellant compiled an outstanding military record during his 21 years of active enlisted and commissioned service. During his 17th year of that service, he started to sexually abuse his then 12–year–old stepdaughter A. Appellant would fondle her breasts and vagina and have her masturbate him.

In the summer of 1992, A shared her secret of abuse with some other children who had been sexually abused. Although A's mother was told about her report, she did not believe it, and A recanted. During the summer of 1993, appellant renewed the abuse.

On November 14, 1993, appellant found himself in a criminal interrogation after A finally reported the abuse again. After a proper rights advisement, appellant initially denied abusing A. However, after further questioning, he admitted some of the acts she reported. In a subsequent interview, he admitted more sexual misconduct with her.

A did not testify at trial in person. Instead, the parties stipulated to her testimony. A's stipulation of expected testimony paints a more tragic picture of abuse than appellant rendered during his plea inquiry with the judge. *See* R.C.M. 910(e). According to A, appellant fondled her breasts monthly and her vagina at least 15 times, including 7 or 8 times after her 1992 report. A said after she recanted her report of abuse, appellant told her "sarcastically," "What's the matter did you get scared?" A also said appellant would insert his fingers into her vagina, and give her money or let her have privileges in exchange for sexual touching.

DISCUSSION

The Eight Amendment prohibits cruel and unusual punishment as does Article 55, Uniform Code of Military Justice, 10 United States Code § 855. Specifically, Article 55 prohibits flogging, branding, marking, tattooing, or "any other cruel or unusual punishment."

Basically, appellant contends his dismissal constitutes a financial flogging disproportionate to his crimes because execution of that punishment will deprive him of "over half a million dollars" in retired pay. We conclude otherwise. Article 66(c), UCMJ, 10 U.S.C. 866(c).

Dismissal is a punitive separation from the armed forces specifically authorized under military law, *see* Article 56, UCMJ, 10 U.S.C. § 856; R.C.M. 201(f)(1)(A)(ii), 1003(b)(10)(A); and neither rank nor lengthy service insulates an officer from that authorized punishment, *see, e.g., United States v. Doctor,* 7 U.S.C.M.A. 126, 21 C.M.R. 252 (1956) (dismissal of lieutenant colonel with 28 years service). Moreover, even a retired officer is subject to court-martial jurisdiction and a sentence to dismissal, which would terminate retirement pay. *United States v. Hooper,* 9 U.S.C.M.A. 637, 26 C.M.R. 417 (1958) (court-martial of

retired Navy rear admiral for sex–related offenses); *see also United States v. Sloan*, 35 M.J. 4 (C.M.A. 1992) (court–martial of retired enlisted sergeant major for sex acts with minors committed before retirement).

The bottom line for us is whether the punishment of dismissal is appropriate under the unique circumstances of this case. *See United States v. Healy*, 26 M.J. 394 (C.M.A. 1988); *United States v. Snelling*, 14 M.J. 267 (C.M.A. 1982). We conclude it is. Accordingly, the findings and sentence are

AFFIRMED.

Senior Judge SNYDER and Judge SCHREIER concur.

OFFICIAL

ALVIN J. STRIBLING
Technical Sergeant, USAF
Chief, Court Administrator

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Colonel JAMS R. LEE, 430–84–3012

United States Air Force

ACM 30984

7 September 1995

—M.J.—

Sentence adjudged 21 October 1993 by GCM convened at Tinker Air Force Base, Oklahoma. Military Judge: Donald E. Weir (sitting alone).

Approved sentence: Dismissal and confinement for 7 years.

Appellate Counsel for Appellant: Colonel Jay L. Cohen, Lieutenant Colonel Frank J. Spinner, Captain Robert I. Smith, and Captain Marge A. Overly.

Appellate Counsel for the United States: Colonel Jeffrey T. Infelise, Colonel Thomas E. Schlegel, and Captain Jane L. Harless.

Before

PEARSON, BECKER and MORGAN
Appellate Military Judges

OPINION OF THE COURT

MORGAN, Judge:

Appellant was convicted pursuant to his guilty pleas of seven specifications of sodomy with three different teenage boys in violation of Article 125 of the Uniform Code of Military Justice[1] (UCMJ), one specification of conduct unbecoming an officer for having a disgraceful and unprofessional relationship with a USAF male E–5, (SSgt M), in violation of Article 133,[2] and fourteen specifications of indecent acts with the same three boys and SSgt M, in violation of Article 134, UCMJ.[3] He assigns three errors: that his sentence to a dismissal and seven years confinement constituted cruel and unusual punishment in violation of the Eighth Amendment; that the sentence was inappropriately severe; and that the military judge erred in not reopening the providence inquiry when evidence arose suggesting lack of mental responsibility. Finding these assignments of error meritless, we affirm.

While assigned to the United States Transportation Command, (USTRANSCOM), appellant rose to a position of prominence and respect in his church, where he was the youth choir director and an adult chaperon at a number of youth functions. The record reveals that he used this position to

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[1] 10 U.S.C. § 925 (1988).

[2] 10 U.S.C. § 933 (1988).

[3] 10 U.S.C. § 934 (1988).

form close relationships with CL and JL, junior high school age twin brothers, and BW, all of whom were, when he first began the acts here charged, under the age of 16. Over a period of time spanning August 1, 1988, through October of 1992, appellant engaged in various indecent acts with the three boys, and orally and anally sodomized two of them on a number of occasions. These acts were variously performed while the appellant accompanied the boys on camping trips, trips to visit appellant's father–in–law, and in motel rooms, the appellant's house, his car, and even in the USTRANSCOM headquarters building on Scott Air Force Base. The record further reveals that during a period of April through October of 1992, the appellant performed various indecent acts with SSgt M, including arranging a temporary duty assignment so as to be with SSgt M in California and vacationing with him in Arkansas. At trial appellant pled guilty to all charges and specifications, but limited his description of the acts substantiating Charge I to incidents of oral sex only. Two of the three boys, however, testified to specific incidents of being anally sodomized by appellant.

I. WHETHER DISMISSAL CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT

Without objection from trial counsel, appellant was permitted to offer evidence showing that, according to actuarial tables, the value of his retirement based upon his 25 years of active duty service could amount to close to $750,000. Appellant urged the military judge to take careful account of the financial injury to his wife and family attending any forfeitures. The thrust of appellant's sentencing case was that confinement would sever the course of counseling and therapy essential to his rehabilitation, and that financial penalties would not only injure his wife and family, but would diminish his capability to pay for the counseling, therapy, and

prescriptions needed to assist his young victims, something which ACM 30984 through counsel he offered to do.[4] We infer that this had an impression on the military judge, as forfeitures formed no part of his sentence.

Appellant now argues that, in his circumstances, the punishment of dismissal from the service, with the attendant consequence of loss of retired pay, offends the Eighth Amendment's prohibition of cruel and unusual punishment or excessive fines.[5] Appellant's argument suffers from a number of infirmities, not the least of which is that the loss of retired pay is not a component of the sentence. It is, rather, a *potential* consequence of the sentence. The general rule has been that collateral consequences of a sentence are not properly a part of the sentencing consideration. *See United States v. Cleckley*, 8 U.S.C.M.A. 83, 23 C.M.R. 307, 309 (1957) ("we are not disposed to interpret the financial statutes to restrict the power of a court to sentence as authorized by military law. . . . To reach a contrary conclusion would throw the whole system of sentencing in military courts out of

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[4] Appellant's victims, and the parents of CL and JL, testified to grave, and enduring, psychological damage occasioned by appellant's conduct. CL, particularly, suffered from panic attacks, unwillingness to go into men's locker rooms, severe weight loss, depression and sleeplessness. At the time of trial he was undergoing treatment with anti–depressants and anti–anxiety prescription drugs. BW would testify only under the condition that his mother not be present at trial. The record, including a voluminous clemency submission, is silent as to whether appellant followed–up on his offer to fund therapy.

[5] In addition to appellant's Eighth Amendment protection, Article 55, UCMJ, 10 U.S.C. § 855, entitled **"Cruel and Unusual Punishments Prohibited,"** provides "[p]unishment by flogging, or by branding, marking, or tattooing on the body, or any other cruel or unusual punishment, may not be adjudged by a court–martial or inflicted upon any person subject to this chapter."

balance."); *United States v. Quesinberry,* 12 U.S.C.M.A. 609, 31 C.M.R. 195, 198 (1962) (courts–martial are to concern themselves with the appropriateness of a particular sentence for an accused "without regard to the collateral administrative effects of the penalty under consideration"). *Compare United States v. Pajak,* 11 U.S.C.M.A. 686, 29 C.M.R. 502 (1960) (plea of guilty not improvident even where appellant unaware that Hiss Act would have effect of denying him retirement earned after 25 years active service) *with United States v. Paske,* 11 U.S.C.M.A. 689, 29 C.M.R. 505 (1960) (staff judge advocate did not err in failing to advise convening authority of adverse financial consequence of sentencing as a result of decision of comptroller general). This rule has remained undisturbed after more than 30 years. *See, e.g., United States v. McElroy,* 40 M.J. 368, 372 (C.M.A. 1994), *cert. denied,* 115 S. Ct. 1256 (1995); *United States v. Griffin,* 25 M.J. 423, 424 (C.M.A.), *cert. denied,* 487 U.S. 1206 (1988) ("The general rule concerning collateral consequences of a sentence is that 'courts–martial [are] to concern themselves with the appropriateness of a particular sentence for an accused and his offense, without regard to the collateral administrative effects of the penalty under consideration.' We see no need to relax this rule today." (citations omitted)). There is authority for the proposition, however, that the loss of retired pay *for one who is retirement eligible* is a collateral consequence only in theory, and "in reality, the impact of an adjudged punishment on the benefits due an accused who is eligible to retire is often the single most important sentencing matter to that accused and the sentencing authority." *Griffin,* 25 M.J. at 424. *Cf. Henderson v. United States,* 29 M.J. 221, 222 (C.MA. 1989) (loss of retired pay for one three years away from retirement so collateral as to be inadmissible).

Whether the loss of retirement benefits and pay is a direct or a collateral consequence of the imposition of a punitive discharge, it is indisputable that it is a *consequence* of the

sentence and forms no part of the sentence itself. The Eighth Amendment states, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted." We reject out of hand analysis of appellant's case under the "cruel and unusual punishment" portion of the Eighth Amendment, as loss of retired pay is in no sense a punishment administered by court–martial. *See Walton v. Arizona*, 497 U.S. 639, 670 (1990) (Scalia, J., concurring) (last portion of Eighth Amendment only regulates punishments, which to offend that amendment must be cruel *and* unusual.) We doubt that punitive discharge from the service is cruel in the context intended by the Constitution. Certainly it is not unusual.

We likewise doubt that the probability of a loss of retired pay attending a punitive discharge is reviewable against the constitutional prohibition of "excessive fines." The "entitlement" to military retired pay following 20 years of service is, strictly speaking, not an entitlement at all, as it is at all times discretionary with the Secretary of the Air Force. 10 U.S.C. § 8911 (1994). The Secretary, similarly, is empowered to commute, remit, or suspend a dismissal, which may not be executed until the Secretary has approved it and the Court of Appeals for the Armed Forces has either rejected a petition for review, or ruled on the case, and if a petition for certiorari is filed, the Supreme Court has acted on such petition. 10 U.S.C. § 871 (1994). Read together, these two statutes mean that the Secretary of the Air Force is free to disapprove appellant's dismissal and approve his retirement.

Nor is appellant's assumption of an automatic loss of retired pay and its reduction to a dollar figure the legal equivalent of a fine.[6] The punishment available at

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[6] The Court of Military Appeals has reserved opinion as to whether an actuarial estimate of the value of retired benefits could be relevant evidence, even in sentencing. *United States v. Henderson*, 29 M.J. 221, 222 (C.M.A. 1989).

court–martial is precisely articulated, and its limits may be precisely ascertained. Article 56 of the UCMJ[7] permits the President to prescribe forms of punishment, of which a fine is one. R.C.M. 1003(b)(3). A fine, imposed as part of a sentence adjudged, is a sum certain, is intended to be and is imposed as punishment. As a judgment of the court, it makes the accused immediately liable to the United States for the entire amount of money specified in the sentence. As such, it is amenable to analysis with reference to the strictures of the Eighth Amendment.

By contrast, the loss of military non–disability retirement eligibility is neither a sum certain, nor is it a judgment of a court–martial. While *Griffin* appears to stand for the proposition that a sentencing authority may, with the permission of the accused, be instructed upon and consider the likelihood of the loss of retirement eligibility that would likely result from the sentence of a punitive discharge for a retirement eligible accused, we do not believe that *Griffin* requires the military judge to allow actuarial evidence of the potential economic consequences which might ensue.[8] Indeed, holding in favor of appellant on Eighth Amendment grounds would have the practical consequence of declaring the punitive discharge of *any* retirement eligible accused constitutionally impermissible, a result which would have astounded the drafters of the Bill of Rights.

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[7] 10 U.S.C. § 856 (1994).

[8] Affixing a dollar value to the loss of retirement eligibility necessarily depends upon the manipulation of a vast number of variables and assumptions relating to life expectancies, the value of benefits, inflation, and future legislation, a sentencing procedure we do not believe *Griffin* and *Henderson* approve.

II.

WHETHER APPELLANT'S SENTENCE IS INAPPROPRIATE

Appellant points with justifiable pride to his lengthy and honorable service, including flying combat missions in the C–130 in Vietnam. Unfortunately, that service is, in part, what enabled him to insinuate himself so effectively into the confidence of his victims and their families. The cynical exploitation of appellant's standing and accomplishments in the Air Force, his perverse twisting of Biblical scripture to not merely rationalize, but sanctify his crimes to his victims, and the callous disregard for the physical and psychological health of those victims dwarf in their enormity the achievements of appellant's career. Even allowing for multiplicity, counsel for all sides and the military judge agreed that appellant could have been sentenced to 106 years in prison, while his pretrial agreement called for a maximum of 15 years confinement, total forfeitures, and a dismissal. Under the circumstances, we cannot say that confinement for seven years, a dismissal, and no forfeitures is inappropriately severe.

III. PROVIDENCY OF THE GUILTY PLEA

Appellant's last assignment of error hinges on the testimony of a psychiatrist who testified during the sentencing portion of the trial, Dr. John R. Smith. In his brief, appellant asserts that Dr. Smith testified to the effect that appellant had *"no power to change"* the sexual behavior. (Emphasis appellant's.) Based upon this testimony, appellant argues the judge should have reopened the providency inquiry to further explore whether a sanity defense might obtain. A complete reading of the record does not support the inference appellant wishes the court to draw. The reference to "no power to change" was to the development of appellant's homosexual

orientation,[9] not to his ability to differentiate right from wrong. Dr. Smith specifically testified that appellant "does not have any significant psychiatric disorder of the type that would interfere with his ability to think, to behave rationally and reasonably." This evidently was the conclusion of the sanity board requested by the appellant, which, according to Dr. Smith, did not turn out as appellant had hoped. Although the record shows that a sanity board was conducted, and that the appellant's expert witness had examined it, it was not introduced at trial, and trial defense counsel specifically denied that her investigation had revealed any facts giving rise to a defense. The military judge is entitled to afford weight to that judgment of trial defense counsel. *United States v. Clark,* 28 M.J. 401 (C.M.A. 1989). We do not, therefore, find even the possibility of such a defense, much less a substantial basis in law and fact for questioning the plea sufficient for us to upset the trial judge's determination in this case. *United States v. Prater,* 32 M.J. 433, 436 (C.M.A. 1991); *United States v. Logan,* 22 U.S.C.M.A. 349, 351, 47 C.M.R. 1, 3 (1973).

Accordingly, the findings and sentence are correct in fact and in law, and are

AFFIRMED.

Senior Judge PEARSON concurs.

Judge BECKER (concurring in the result):

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[9] The recitation to this portion of Dr. Smith's testimony is particularly ironic, since it was the stated purpose of appellant's trial defense counsel to use Dr. Smith to testify to the contrary, that is, that appellant differed from the ordinary homosexual pedophile in that he was capable of reorienting his sexual proclivities through rehabilitation.

I agree with the lead opinion's holding in the Eighth Amendment issue, and most of its analysis. Loss of retirement pay due to a punitive discharge is not part of a court–martial's sentence. Accordingly, it is neither a "cruel and unusual punishment" nor an "excessive fine" within the meaning of the Eighth Amendment.

However, I dissociate myself from portions of the lead opinion which, in my view, imply that loss of retirement pay should be considered a mere collateral consequence of punishment and, therefore, is not a permissible sentencing factor. *See* slip op. at 3–4. To the contrary, I believe the loss of such benefits to an otherwise retirement–eligible accused is a proper matter in mitigation. *See* R.C.M. 1001(c)(1)(B); *United States v. Griffin*, 25 M.J. 423, 424 (C.M.A.), *cert. denied*, 487 U.S. 1206 (1988).

I also dissociate myself from the lead opinion's implication that evidence of the dollar value of retirement benefits may not be admissible, even if loss of benefits is a proper sentencing consideration. *See* slip op. at 5, n.8. Approximating a potential financial loss from a punitive discharge is not an impractical task. Indeed, the parties here did so without apparent difficulty or controversy. Military judges have the discretion in this area to avoid confusion, misleading members, undue delay, waste of time, and needless accumulation of evidence. Mil. R. Evid. 403. Therefore, we need not fear that litigants will run amok in fiscal intricacies. If the potential loss of retirement benefits is a legitimate mitigating factor––and I believe it is, at least when an accused is retirement–eligible––then the sentencing authority should be allowed to hear something about what they are worth.

These portions of the lead opinion are not necessary to its otherwise excellent analysis of the appellant's Eighth Amendment argument. They are *dicta*, and should not be

taken as authority for excluding evidence of how much a retirement–eligible accused stands to lose if the sentence includes a punitive discharge. I fully concur with the lead opinion's resolution of the remaining assignments of error.

OFFICIAL

LAURA L. GREEN
Clerk of Court

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Technical Sergeant ALFRED D. BURROWS, FR548–06–7992

United States Air Force

ACM 31112

18 September 1995

Sentence adjudged 15 February 1994 by GCM convened at McChord Air Force Base, Washington. Military Judge: Martha H. Bower.

Approved sentence: Dishonorable discharge, confinement for 42 months, and reduction to E–1.

Appellate Counsel for Appellant: Colonel Jay L. Cohen, Captain Marge A. Overly, and Captain Margarete A. Wiemer.

Appellate Counsel for the United States: Colonel Jeffrey T. Infelise, Colonel Thomas E. Schlegel, and Captain Timothy G. Buxton.

Before

PEARSON, BECKER, and MORGAN
Appellate Military Judges

PER CURIAM:

We conclude that civilian trial defense counsel knowingly and intelligently waived any issue concerning the admissibility

of evidence about Mrs. Burrows' entitlement to a portion of appellant's retirement benefits. In this regard, defense counsel even offered to stipulate to the effect that a change in federal law, 10 United States Code § 1408, had on appellant's retirement benefits when the prosecutor offered this evidence in rebuttal to defense financial hardship evidence. Even if defense counsel did not knowingly and intelligently waive the issue, we conclude that plain error is not present so as to excuse his failure to object. *See United States v. Pagel,* 40 M.J. 771 (A.F.C.M.R. 1994); *United States v. Spears,* 39 M.J. 823 (A.F.C.M.R. 1994). Appellant's sentence to a punitive discharge is not cruel and unusual punishment. *United States v. Lee,* __ M.J. __ (A.F. Ct.Crim. App. Sep. 7, 1995).

We have examined the record of trial, the assignment of errors, and the government's reply thereto and have concluded that the findings and sentence are correct in law and fact, the sentence is appropriate, and no error prejudicial to the substantial rights of the appellant was committed. Accordingly, the findings of guilty and the sentence are

AFFIRMED.

OFFICIAL

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Technical Sergeant, USAF
Chief, Court Administrator